84-744

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES C. LANE AND DENNIS R. LANE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in reversing respondents' convictions on the basis of misjoinder under Rule 8 of the Federal Rules of Criminal Procedure without determining whether the misjoinder constituted harmless error.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 735 F.2d 799.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 21a) was entered on June 18, 1984. A petition for rehearing was denied on August 22, 1984 (App., *infra*, 22a-23a). On October 11, 1984, Justice White extended the time in which to file a petition for a writ of certiorari to November 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Fed. R. Crim. P. 8 provides:

> (a) **Joinder of Offenses.** Two or more offenses may be charged in the same indictment or informa-

tion in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 52(a) provides:

Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, respondent James C. (J.C.) Lane was convicted on four counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy, in violation of 18 U.S.C. 371. He was sentenced to a total of seven years' imprisonment and fined $9,000. His son, respondent Dennis Lane, was convicted on three counts of mail fraud, one count of conspiracy, and one count of perjury, in violation of 18 U.S.C. 1623. He was sentenced to custody under the Youth Corrections Act, 18 U.S.C. 4216, 5010(b). The court of appeals reversed (App., *infra*, 1a-20a).

1. Each respondent was charged in five counts of a six-count indictment encompassing three arson-for-profit schemes. Count 1 charged J.C. Lane with mail fraud in connection with a 1979 fire in a restaurant in Amarillo, Texas. Counts 2-4 charged both respondents with mail fraud in connection with a 1980 fire in a duplex in Amarillo. Count 5 charged both respondents

with conspiracy in connection with the planned arson of a flower shop in 1980 in Lubbock, Texas. Count 6 charged Dennis Lane with perjury before a grand jury investigating the flower shop scheme in 1981. Respondents' motions for severance before and during trial were denied. They were tried jointly and convicted on all counts. App., *infra*, 8a.

a. The evidence at trial showed that J.C. Lane and three partners opened the El Toro restaurant in Amarillo in the summer of 1978. They leased the building and restaurant equipment for a term of five years. App., *infra*, 2a. A clause in the lease provided that it would be terminated under certain circumstances in the event of fire (Tr. 34-37; GX 1). The restaurant never operated at a profit, suffering declining sales after September 1978 and sustaining losses of $20,000 during 1978 and $9,000 during the two months it operated in 1979 (App., *infra*, 2a, 3a n.1).

J.C. Lane purchased fire insurance for the restaurant in November 1978, covering the contents and improvements for $10,000 each and providing a maximum of $18,000 for business losses. At about the same time he contacted Sidney Heard, a professional "torch," asking him how much it would cost to burn the building and stating that he wanted to get out of his lease and the partnership.[1] Heard set a fire in the building on February 27, 1979, which did not destroy it but did damage its contents. App., *infra*, 2a.

The insurance company settled with Lane for $10,000 on the building's contents and $9,200 on the improvements. On June 1, 1979, the insurance adjustor mailed a memorandum to the company's regional headquarters

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[1] Evidence of Heard's prior dealings with J.C. Lane in connection with two other arsons was excluded by the trial court (Tr. 229, 370-376). Heard, who testified at trial, had entered into a plea agreement with the government (Tr. 265-275, 605-606).

concerning settlement of Lane's business-interruption claim. Included with the memorandum was a list of the restaurant's monthly income and expenses submitted by Lane, falsely claiming a net monthly profit of $2,500. This mailing was charged in count 1 of the indictment. On November 1, 1979, the claim was settled for $2,700. App., *infra*, 2a-3a.

Dennis Lane was not involved in the restaurant arson. At the time the evidence relating to this count was received, the trial judge instructed the jury that the evidence was not to be considered against him (Tr. 95-96). The judge repeated this instruction in her final charge, together with an instruction regarding the separate consideration to be given each defendant and each count (Tr. 984-985).

b. In early 1980, J.C. Lane hired Heard to set fire to a duplex that Lane was moving to a vacant lot in Amarillo. The duplex was owned by Dennis Lane and Andrew Lawson, doing business as L & L Properties. On January 22, 1980, J.C. Lane obtained a $35,000 fire insurance policy on the building, which had been purchased for $500. The duplex was burned on May 1, 1980, by Marvin McFarland, an employee of Heard's. App., *infra*, 3a-4a.

Shortly after the fire, Dennis Lane signed an initial proof-of-loss form claiming $7,000 and stating that the "loss did not originate by any act, design or procurement on the part of your insured or this affiant" and that "no attempt to deceive [the] company as to the extent of the loss has been made" (App., *infra*, 4a). Dennis Lane submitted additional proof-of-loss forms later in May 1980 claiming $5,000 for repairs to the building. He also submitted what purported to be invoices for materials used in making repairs. Certain of the repairs had in fact not been performed; the invoices were fabricated by J.C. Lane together with Heard and his secretary. The total amount paid on the policy was

over $24,000. The mailings of the proof-of-loss forms and invoices were charged in counts 2 through 4 of the indictment. *Id.* at 4a-5a.

c. At a meeting with respondents and Lawson several weeks after the duplex fire, Heard proposed that they establish and burn a phony flower shop in Lubbock. Respondents agreed to participate in the plan. Heard's associate William Lankford, who operated L & L Designs, an artificial-flower business in Amarillo, agreed to stock the Lubbock shop with old flowers and broomweed. Heard and Dennis Lane picked out a suitable building in July 1980, which Lankford stocked in August. Lankford prepared fictitious invoices for merchandise purportedly delivered to the shop. In November 1980, J.C. Lane insured the contents of the shop for $50,000. Heard was later arrested and Lankford questioned with respect to an unrelated crime, and the planned arson of the flower shop never took place. In March 1981, a newspaper article connected Dennis Lane to a scheme to burn the shop with Heard. The same day, J.C. Lane cancelled the insurance policy on the shop. App., *infra*, 5a-7a. In May 1981, Dennis Lane appeared before a grand jury investigating Heard. He testified that Heard had nothing to do with the flower shop or with his own dealings with Lankford. *Id.* at 7a-8a.

2. The court of appeals reversed respondents' convictions, holding (App., *infra*, 9a) that count 1 "should not have been joined with the others [under Fed. R. Crim. P. 8(b)] because it was not part of the same series of acts or transactions as Counts 2 through 6." The court reasoned that the restaurant fire was entirely separate from the other crimes and that it was not linked to them by any common scheme or plan (App., *infra*, 9a-13a). The court did conclude, however, that counts 2 through 6 were properly joined (*id.* at 13a).

The court refused to consider the government's argument that the error, if any, was harmless. Stating only that "Rule 8(b) misjoinder is prejudicial *per se* in this circuit" (App., *infra*, 13a) and that it is "inherently prejudicial" (*id.* at 10a), the court remanded for new trials on all counts.[2] Under the court's ruling (*id.* at 13a), respondents on remand may be tried jointly on counts 2 through 6 with a separate trial for J.C. Lane on count 1.[3] The court denied the government's petition for rehearing without opinion (App., *infra*, 22a-23a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals reversing respondents' convictions without determining whether the improper joinder of count 1 constituted harmless error conflicts with Rule 52(a) of the Federal Rules of Criminal Procedure, with the decisions of this Court recognizing that appellate courts have a duty to consider whether any trial error was harmless, and with the decisions of several courts of appeals refusing to reverse convictions on the basis of misjoinder in the absence of a showing of prejudice to the defendants. In view of the substantial number of cases raising joinder questions, the decision below entails serious implications for the administration of criminal justice in the federal courts. Accordingly, review by this Court is warranted.[4]

1. Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error * * * which does not affect substantial rights shall be disregarded." In *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), this Court made it clear that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless" (slip op. 9). See also, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 230-232 (1973); *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S 18 (1967); *Kotteakos* v. *United States*, 328 U.S. 750 (1946). The Court in *Hasting* held that the requirement of appellate "consideration of the entire record prior to reversing a conviction" applies to all "errors that may be harmless" (slip op. 10 n.7). A violation of Rule 8's joinder standards surely falls within this category, as we argue below (pages 10-12, *infra*). The decision of the court of appeals thus is in clear violation of the requirement that any adjudication of error be accompanied by a harmless-error analysis.[5]

The approach adopted by the court below directly conflicts with the rule in six circuits, which take the view that misjoinder under Rule 8[6] may constitute

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[2] The court rejected respondents' challenge to the sufficiency of the evidence (App., *infra*, 13a-20a).

[3] Although the court did not address the issue, it seems clear that, under Rule 8(a), count 1 could properly be joined with counts 2 through 5 at a trial of J.C. Lane alone. Accordingly, each respondent may be tried on all his charges at a trial separate from that of the other respondent.

[4] Although we believe, as we argued to the court of appeals, that the joinder was permissible here, we are not presenting this largely factual question in the petition.

[5] The decision below also violates 28 U.S.C. 2111, which provides that "[o]n the hearing of any appeal * * *, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

[6] In considering whether to apply the harmless-error rule, it should make no difference whether the joinder was of offenses under Rule 8(a) or of defendants under Rule 8(b). See, *e.g.*, *United States* v. *Ajlouny*, 629 F.2d at 843 (treating issue as one under Rule 8 and citing precedents addressing both subsections of the Rule). We note that, although the language of the Rule may support a different result, the courts have generally applied Rule 8(a) only to single-defendant indictments and not to the joinder of counts charging one defendant in the context of a multi-defendant indictment. See 1 C. Wright, *Federal Practice and Procedure: Criminal* § 143, at 479 & n.1 (2d ed. 1982)

harmless error. See, *e.g.*, *United States* v. *Ajlouny*, 629 F.2d 830, 843 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981); *United States* v. *Seidel*, 620 F.2d 1006 (4th Cir. 1980); *United States* v. *Hatcher*, 680 F.2d 438, 442 (6th Cir. 1982); *United States* v. *Varelli*, 407 F.2d 735, 747-748 (7th Cir. 1969) (dictum); *United States* v. *Martin*, 567 F.2d 849, 854 (9th Cir. 1977); *Baker* v. *United States*, 401 F.2d 958, 972-974 (D.C. Cir. 1968).[7] The other circuits deem misjoinder prejudicial per se and not subject to the harmless-error rule. See, *e.g.*, *United States* v. *Turkette*, 632 F.2d 896, 906 & n.35 (1st Cir. 1980), rev'd on other grounds, 452 U.S. 576 (1981); *United States* v. *Graci*, 504 F.2d 411, 414 (3d Cir. 1974) (dictum); *United States* v. *Bova*, 493 F.2d 33 (5th Cir. 1974); *United States* v. *Bledsoe*, 674 F.2d 647, 654, 657-658 (8th Cir.), cert. denied, 459 U.S. 1040 (1982); *United States* v. *Eagleston*, 417 F.2d 11, 14 (10th Cir. 1969); *United States* v. *Ellis*, 709 F.2d 688, 690 (11th Cir. 1983). This even split among the circuits plainly warrants resolution by this Court.

2. By its terms, the harmless-error rule applies to "[*a*]*ny* error * * * which does not affect substantial rights." Fed. R. Crim. P. 52(a) (emphasis added). The rule makes no exception for claims of improper joinder, and no sound reason supports the creation of such an

(citing cases); 8 *Moore's Federal Practice* ¶ 8.05[1], at 8-19 (2d ed. 1982).

[7] Most of these courts had previously taken the view that misjoinder is prejudicial per se. See, *e.g.*, *Ingram* v. *United States*, 272 F.2d 567 (4th Cir. 1959); *United States* v. *Sutton*, 605 F.2d 260, 272 (6th Cir. 1979);*United States* v. *Gougis*, 374 F.2d 758, 762 (7th Cir. 1967); *Metheany* v. *United States*, 365 F.2d 90, 94-95 (9th Cir. 1966), cert. denied, 393 U.S. 824 (1968); *Ward* v. *United States*, 289 F.2d 877, 878 (D.C. Cir. 1961). The Second Circuit has from the beginning adhered to its current position that misjoinder may be harmless. See *United States* v. *Granello*, 365 F.2d 990, 995 (2d Cir. 1966) (Friendly, J.), cert. denied, 386 U.S. 1019 (1967).

exception. On the contrary, to require a new trial even though the asserted misjoinder was harmless error would be inconsistent with the beneficial purposes of both Rule 52[8] and Rule 8.[9] In *Schaffer* v. *United States*, 362 U.S. 511, 517 (1960), the Court seemingly recognized that the harmless-error rule is applicable to improper joinder, but it found that the "rule * * * is not even reached in the instant case, since here the joinder was proper under Rule 8(b) and no error was shown." See *United States* v. *Granello*, 365 F.2d 990,

[8] See *Hasting*, slip op. 10 ("The goal * * * is 'to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error,'" quoting R. Traynor, *The Riddle of Harmless Error* 81 (1970)); *Kotteakos* v. *United States*, 328 U.S. at 758-760. In the context of a criminal prosecution, the harmless-error rule recognizes that "justice, though due to the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.). See also *Bruton* v. *United States*, 391 U.S. 123, 135 (1968) ("'A defendant is entitled to a fair trial not a perfect one,'" quoting *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953)).

[9] See, *e.g.*, *Bruton* v. *United States*, 391 U.S. at 134 (joint trials "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial"); *Parker* v. *United States*, 404 F.2d 1193, 1196 (9th Cir. 1968), cert. denied, 394 U.S. 1004 (1969) (joinder "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once"); *United States* v. *Werner*, 620 F.2d 922, 928 (2d Cir. 1980) ("trial convenience and economy of judicial and prosecutorial resources [are] considerations of particular weight when the Government and the courts have been placed under strict mandate to expedite criminal trials [under the] Speedy Trial Act").

995 (2d Cir. 1966), cert. denied, 386 U.S. 1019 (1967). See also *Kotteakos* v. *United States*, 328 U.S. at 775 (harmless-error and joinder rules "must be construed and applied so as to bring them into substantial harmony, not into square conflict").[10]

In *Hasting*, the Court noted that "certain errors may involve 'rights so basic to a fair trial that their infraction can never be treated as harmless error'" (slip op. 9 n.6, quoting *Chapman* v. *California*, 386 U.S. at 23). Such fundamental rights include the right to counsel[11] and the right to an impartial judge.[12] The joinder standards of Rule 8, which are not even of constitutional magnitude,[13] obviously do not rise to the level of

[10] *McElroy* v. *United States*, 164 U.S. 76 (1896), while often cited for the proposition that misjoinder is prejudicial per se, in fact does not establish such a rule. In that case, which was decided prior to either the adoption of the Federal Rules of Criminal Procedure in 1946 or the enactment of the harmless-error statute in 1919 (see Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181, 28 U.S.C. (1946 ed.) 391), the government argued that the finding of misjoinder did not require reversal of the convictions of those defendants who had been charged in all counts "because there is nothing in the record to show that they were prejudiced or embarrassed in their defense by the course pursued" (164 U.S. at 81). The Court rejected this argument on the ground that "[i]t cannot be said * * * that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions" (*ibid.*). Thus, *McElroy* rests upon the conclusion that the misjoinder there might have been prejudicial and so could not be presumed harmless. See *United States* v. *Granello*, 365 F.2d at 995.

[11] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

[12] *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

[13] "[N]o federal court has raised misjoinder to an error of constitutional dimension." Note, *Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion*, 6 Hofstra L. Rev. 533, 540 (1978) (footnote omitted). See, *e.g.*, *United States* v. *Seidel*, 620 F.2d at 1013

these fundamental rights. Nor is the prejudice that may result from misjoinder so difficult to ascertain that it should be presumed: Rule 14[14] provides for an inquiry by the trial court into the possible prejudice flowing from joint trials, and there is no reason why the reviewing court cannot undertake the same examination with respect to Rule 8. Indeed, those circuits that have applied Rule 52(a) to misjoinder have engaged in the same sort of careful inquiry into the possibility of prejudice that has characterized the proper application of the harmless-error rule in other contexts. See, *e.g.*, *United States* v. *Seidel*, 620 F.2d at 1009-1011; *United States* v. *Turbide*, 558 F.2d 1053, 1051-1063 (2d Cir.), cert. denied, 434 U.S. 934 (1977). See also 8 *Moore's Federal Practice* ¶ 8.05[1], at 8-18 to 8-19 (2d ed. 1982) (application of Rule 52(a) to misjoinder "is acceptable and even desirable * * *[;] [d]efendants will suffer * * * only if, in

(misjoinder only "a violation of a mere procedural rule") (footnote omitted). While joinder may of course give rise to constitutional violations (see, *e.g.*, *Bruton* v. *United States*, *supra*), this Court has not suggested that a violation of Rule 8 in itself contravenes any constitutional provision. See generally *Schaffer* v. *United States*, *supra*; *Bruton*, 391 U.S. at 131 n.6 (joinder rules designed to achieve economies withut violating rights of defendants). The Court's discussion of the harmless-error standard for nonconstitutional violations in *Kotteakos* v. *United States*, *supra*, which raised joinder as well as variance issues (328 U.S. at 756 n.6, 774), further suggests that improper joinder does not violate the Constitution.

[14] Fed. R. Crim. P. 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver in the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at trial.

the name of 'efficiency,' the [harmless-error] doctrine is not carefully and strictly construed").

In support of the view that the harmless-error standard is inapplicable to misjoinder, it has been argued that application of Rule 52(a) in these circumstances would effectively make Rule 8 redundant with Rule 14, which expressesly addresses the issue of prejudicial joinder (see note 14, *supra*). See, *e.g.*, 1 C. Wright, *Federal Practice and Procedure: Criminal* § 145, at 529-530 (2d ed. 1982). But this objection misses the crucial fact that the rules are addressed to procedures in the district court, where they are quite clearly distinct: Rule 8 *requires* the court to grant a motion for severance unless its standards are met, even in the absence of prejudice, while Rule 14 gives the court *discretion* to grant such a motion in the case of joinder that, though proper under Rule 8, is prejudicial. This difference goes to the queston whether there has been error at all, not to the quite distinct question whether the error requires setting aside the convictions; consequently, it is wholly fallacious to contend that the difference in the rules is eviscerated simply because, on appeal, a reviewing court will not set aside a conviction for a violation of Rule 8 in the absence of prejudice.

Moreover, even when Rule 52(a) is applied to violations of Rule 8, an important distinction remains between appellate review of the denial of Rule 8 motions and of those brought under Rule 14: the former are reviewed as a matter of law, with affirmance proper only if the government has carried the burden of establishing the harmlessness of any error, while the latter are reviewed under the highly deferential abuse of discretion standard, with the defendant having to shoulder the burden of a clear demonstration of substantial prejudice. For these reasons, Rule 14 cannot be said to create an implicit exception to the application of the harmless-error standard with respect to misjoinder. See *United States* v. *Seidel*, 620 F.2d at 1014-1015; *United States* v. *Werner*, 620 F.2d 922, 926 (2d Cir. 1980); *Baker* v. *United States*, 401 F.2d at 973; *United States* v. *Granello*, 365 F.2d at 995.

3. While this court, if it agrees with us that misjoinder is subject to harmless-error evaluation, may prefer to remand to the court of appeals for consideration of the harmfulness of the misjoinder of count 1, we believe there can be no question that it did not materially prejudice respondents' rights in the circumstances of this case.[15] First, the error in joining count 1 with the others was at most exceedingly marginal. Although there may not have been a single overarching conspiracy encompassing all three arson schemes, their close relation in terms of time, method, and participants suggests that it was only the court of appeals' narrow reading of Rule 8 that resulted in its conclusion (Pet. App. 9a-13a) of misjoinder here. Second, the testimonial and documentary evidence against respondents was overwhelming and countered by little more than Dennis Lane's denials and J.C. Lane's character defense. There is simply no reasonable probability in light of the evidence that the joinder of count 1 contributed to respondents' convictions. Finally, the new trials of respondents would be so substantially similar to the trial that they have already had that any conclusion of prejudice can only be deemed speculative. At a joint trial of counts 2 through 6, evidence of the first arson would still be admissible to establish J.C. Lane's intent or for similar purposes under Fed. R. Evid. 404(b). Respondents would receive limiting instructions just as they did at the first trial (see page 4, *supra*). Any possibility of transferance of guilt is remote in light of the substantial involvement of both respondents and would not in

[15] Because violation of Rule 8 is not an error of constitutional dimension (see note 13, *supra*), the harmfulness of the error in this case is to be assessed under the normal standard of *Kotteakos* (see 328 U.S. at 764-765) rather than under the strict reasonable doubt standard established by *Chapman* for constitutional violations.

any event be reduced on joint retrial. Finally, reversal of J.C. Lane's convictions on counts 2 through 5 is wholly unsupportable, as they could have been tried with count 1 or with count 6; surely no demonstrable prejudice arose simply because they were tried with both of these counts.

Respondents were convicted following a lengthy trial at which the government presented 29 witnesses and more than 100 exhibits. The court of appeals reversed on a technical violation of the joinder requirements without any determination of the harmfulness of the error. At a time when the criminal justice system is already overburdened, such a result, which does nothing to contribute to the fairness of the process, makes little sense indeed. A substantial proportion of prosecutions—all except those based on single-count, single-defendant indictments—raise joinder questions. In view of the importance of the issue and the clear split among the circuits, review by this Court would contribute to the fair, uniform and efficient administration of criminal justice in the federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1984

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 83-1742

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JAMES C. LANE AND DENNIS R. LANE,
DEFENDANTS-APPELLANTS.

JUNE 18, 1984

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before GOLDBERG, RUBIN and REAVLEY, *Circuit Judges.*

GOLDBERG, *Circuit Judge:*

James C. ("J.C.") Lane and Dennis Lane were indicted in multiple counts for mail fraud, conspiracy, and perjury. J.C. alone was indicted in Count 1 for mail fraud in connection with a 1979 fire at a restaurant in Amarillo, Texas. J.C. and Dennis were both indicted in Counts 2 through 4 for various acts of mail fraud related to a 1980 fire at a duplex in Amarillo. They were also both indicted in Count 5 for conspiracy to commit mail fraud in connection with a fire at a Lubbock, Texas flower shop. Dennis alone was indicted in Count 6 for perjury before a Grand Jury. We hold that Count 1 was improperly joined with the other counts pursuant to

Fed.Rule Civ. [*sic*] Proc. 8(b). Therefore, we reverse and remand for new trials.

FACTS

A. The El Toro Restuarant Fire

In the summer of 1978, J.C. Lane opened a Mexican restaurant in Amarillo, Texas. J.C., Jimmy Lane, Bill Dale, and Jack Stotts (a cook) were partners in the business. They leased the building for a term of five years and obtained considerable restaurant equipment. The restaurant never operated at a profit, however, and suffered declining gross sales after September, 1978.

In November, J.C. Lane purchased fire insurance on the restaurant from the Transamerica Insurance Group. He insured the contents of the restaurant ($10,000.00) as well as improvements ($10,000.00). He also insured against business losses resulting from the fire ($6,000.00 per month for three months). At about the same time, he contacted Sidney Heard, a professional "torch." Lane hired Heard to burn the building, telling Heard that he wanted to get out of his lease as well as his partnership with the cook.

On February 27, 1979, Heard entered the building and set a fire near the electrical box in the kitchen. The fire did not destroy the building, but the contents suffered smoke damage. After the fire, David Lard, an insurance adjustor for Transamerica, viewed the premises with Lane. Lane showed him where the "electrical" fire had started. The contents portion of the policy was settled for the full amount, $10,000.00. On April 23, 1979, Lard issued a draft for the sum to the El Toro restaurant. On May 3, 1979, he issued a second draft for $9,213.78, covering the "betterments and improvements" portion of the policy.

Finally, on June 1, 1979, Lard mailed a memorandum to officials at Transamerica's regional headquarters in Dallas. He requested their advice on settling El Toro's

claim under the "business interruption/loss of earnings" portion of the policy. Included with the memo was a list of monthly income and expenses for the El Toro Restaurant submitted by J.C. Lane. The list claimed a monthly net profit of $2,537.64, reportedly based on average profits between September and December, 1978.[1] This mailing is set forth in Count 1 of the indictment, which charges mail fraud. The claim was settled for $2,699.00; and on November 1, 1979, Lard issued a draft in that amount made out to the El Toro Restuarant.

B. The Duplex Fire

Sometime in early 1980, J.C. Lane met with Sidney Heard again. Lane advised Heard that he had bought a duplex for $500.00 and was moving it to a vacant lot at 1105 South Jackson Street in Amarillo. Lane offered to hire Heard to burn the building. A few weeks later, Heard, having inspected the property, accepted Lane's offer. Heard recommended that they pile scrap molding inside the building to fuel the flames; and in time, he did move molding into the duplex.

On January 22, 1980, J.C. Lane obtained a $35,000.00 fire policy on the duplex from the Trinity Universal Insurance Company. The policy listed the property as owned by L & L Properties, a partnership composed of Dennis Lane and Andrew Lawson. The duplex policy was added to a preexisting policy for other properties held by the partnership.

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[1] Tax records showed that the restaurant actually suffered a loss of $22,258.42 during the period between August and December, 1978. *See* Trial Transcript at 149.

Lane did not attempt to average the "profits" earned during the first two months of 1979. Rather, he reported that all 1979 records were destroyed in the fire. Tax records for that period did survive, however, and show a loss of about $9,000.00 during January and February, 1979.

Heard instructed his employee, Marvin McFarland, to burn the duplex. Heard was planning a trip to the Bahamas and wanted the fire to take place while he was out of the country. On May 1, 1980, the duplex burned.

Following the fire, William Liles, an adjustor for Trinity Universal, inspected the property; and on May 9, 1980, Liles issued a draft in the amount of $7,000.00 payable to Dennis Lane and Andrew Lawson doing business as L & L Proprties.[2] At the same time, Dennis Lane and Lawson signed a Proof of Loss form which stated that the "loss did not originate by any act, design or procurement on the part of your insured or this affiant." *See* Government's Exhibit 34-E. The "Proof of Loss" also stated that "no attempt to deceive [the] company as to the extent of the loss has been made." *Id.* The amount claimed on the Proof of Loss was $7,000.00. On May 15, 1980, Liles mailed to the company's headquarters in Dallas a report on repair costs at the duplex along with the Proof of Loss, photographs, and a repair estimate of about $14,000.00 provided by Dennis Lane.

On May 21 and 30, Liles issued additional drafts to the insured for $2,000.00 and $3,000.00 respectively, as the cost of repairs mounted up. Dennis Lane submitted an additional Proof of Loss corresponding to each payment. These documents made the same representations as the initial Proof of Loss. The record does not reveal when Dennis Lane submitted these additional forms, but Liles mailed the $2,000.00 Proof of Loss to Dallas on May 25, along with a memorandum indicating that the repairs were in progress and had exceeded the initial $7,000.00 advanced. On August 6, he mailed an-

[2] The check was also made payable to F.J. Corbin, a mortgagee on the property. Under the policy, Trinity Universal was required to pay the mortgagee as well as the property-owner. *See* Appellee's Brief at 14, n.1. Apparently, Corbin was not involved in the arson.

other progress report, the $3,000.00 Proof of Loss, and an additional Proof of Loss and claim for $2,000.00.[3] The $7,000.00 Proof of Loss and report mailed on May 15 are the subject of Count 2; the two Proofs of Loss and the memo mailed on August 6 are the subject of Court 3.

On September 16, 1980, Liles issued yet another draft, this one for $12,250.00, representing final settlement of the claims and bringing the total amount paid to $24,250.00. On September 18, Liles mailed a memorandum to Dallas explaining the high total cost of restoration. He enclosed a number of invoices supplied by Dennis Lane. Again, it is not clear when Dennis had delivered the documents. The invoices listed various materials and furniture (e.g., mahogany trim, plywood, door jambs, a bathtub) purportedly bought by L & L Properties to repair and refurbish the duplex. In truth, the invoices had been fabricated by J.C. Lane, Sidney Heard, and Heard's secretary. These invoices and Lile's memorandum form the basis for Count 4.

C. The Lubbock Flower Shop Conspiracy

Several weeks after the duplex fire, Sidney Heard visited J.C. Lane's office to collect his payment. J.C., Dennis Lane, and Andrew Lawson were present; and the men began to discuss the duplex. Heard indicated that he did not want to talk in front of Lawson, but Dennis assured him that Lawson was "all right . . . he's my partner and he knows what's going on." Trial Transcript at 252. Heard then told them that he was thinking of going into the flower shop business if they were interested. If they would put up $5,000.00 and cover the rent and insurance on the building, he would take care of the "torch," and a man he knew would supply

[3] It is not clear from the record whether this claim is the same as that represented by the Proof of Loss mailed on May 25. *See infra* note 10.

flowers to outfit the shop. He wanted to set up the shop in Lubbock. Dennis and J.C. liked the idea; and J.C. told Heard to contact them when he had picked out a building.[4]

After the meeting, Heard contacted William Lankford who already ran an artificial flower business in Amarillo (L & L Designs). Lankford agreed to stock the proposed Lubbock shop with old flowers and broomweed. Lankford and Heard planned to insure the contents of the shop for about $50,000.00. They would split $20,000.00 of the proceeds. This cut would be reflected by a note payable to Lankford's company from Dennis Lane.

Later, in June, 1980, Heard introduced Lankford to Dennis Lane. Heard and Dennis had come to Lankford's existing flower shop to see how such a business is run and what kind of supplies are necessary. They did not actually discuss the planned arson at the time because other employees were in the shop.

In July, 1980, Heard began looking for a suitable building to rent for the proposed shop. He and Dennis Lane inspected a building at 3602 Avenue A in Lubbock on July 10. Heard felt that it was a good building to burn; and Dennis put down a deposit on the property. He and Heard returned to Amarillo and, before parting, Dennis gave Heard a $5,000.00 check drawn on the L & L Properties account, payable to L & L Designs. He noted on the check that the payment was for the "first shipment of flowers per invoice." *See* Government Exhibit 30.

Around late August, Lankford delivered some cut silk flower arrangements and processed broomweed to the building in Lubbock. Dennis Lane met him there and unloaded the van while Lankford arranged the

[4] Lawson said that he was about to move to the Midland-Odessa area and would like to set up a similar arrangement there if the Lubbock deal was successful.

flowers inside the building. After returning to Amarillo, Lankford prepared an invoice reflecting the cost of the flowers. He also prepared several fictitious invoices as well as a note in the amount of $20,213.70 payable to L & L Designs from Lane's Flower Shop. He gave the phony invoices and the note to Sidney Heard who passed them on to Dennis Lane. After Dennis signed the note, Heard kept the original.

In July, 1980, J.C. and Dennis Lane signed a lease for the shop at 3602 A Avenue. Then, in November, J.C. obtained insurance on the shop from the American States Insurance Company. He insured the contents of the shop for $50,000.00. The shop never burned, however. On March 18, 1981, an Amarillo newspaper ran an article connecting Dennis Lane with a scheme to burn the Lubbock flower shop. On the same date, J.C. Lane cancelled the insurance policy.

D. Dennis Lane's Appearance Before the Grand Jury

On May 12, 1980 [*sic*], Dennis Lane appeared to testify before a Federal Grand Jury in Amarillo. At the time, the Grand Jury was investigating Sidney Heard. Lane testified that after talking to Lankford about the flower business, he decided to open a shop of his own. He chose Lubbock because Amarillo already had a flower shop (Lankford's business, L & L Designs). He said that he paid Lankford $5,000.00 cash to supply the original merchandise. He insured the contents of the store for $50,000.00 because that is the value of the goods he was supposed to receive ultimately from Lankford. He stated however that he never received the full amount and was not able to open the store as a result.

In the course of questioning, he responded as follows:

Q: Did Mr. Heard have anything to do with this flower shop?

A: No, sir.

Q: Did he have anything to do with your dealings with Lankford?

A: No, sir.

PROCEEDINGS BELOW

The Grand Jury indicted J.C. Lane for mail fraud in connection with the El Toro Restuarant fire (Count 1). It indicted both J.C. and Dennis Lane for mail fraud related to the duplex fire (Counts 2-4). They also were both indicted for conspiracy to commit mail fraud in the course of the Lubbock flower shop scheme (Count 5). Finally, Dennis Lane was indicted for perjury before the Grand Jury (Count 6). The indictment alleged that he committed perjury by denying that Sidney Heard was involved with the flower shop or with the transactions between Lane and George Lankford.

J.C. and Dennis Lane were tried jointly before a jury in the United States District Court for the Northern District of Texas, Amarillo Division. They filed pretrial Motions for Severance, contending that their offenses were misjoined in violation of Fed. Rule Crim.Proc. 8(b). They renewed the motions at the end of the Government's evidence, and again at the close of all evidence. The trial court denied the motions each time.

The jury convicted the defendants on each count against them. J.C. Lane was sentenced to a total of seven years' imprisonment and committed fines of $9,000.00.[5] Dennis Lane was found suitable for treatment under the Youth Corrections Act, 18 U.S.C.

[5] J.C. was sentenced to five years' imprisonment on Count 1 and a committed fine of $1,000.00. He was sentenced to two years' imprisonment on each of Counts 2 through 4, and committed fines of $1,000.00 on each count. Finally, he was sentenced to five years' imprisonment on Count 5 and a committed fine of $5,000.00. The terms of imprisonment in Counts 2-4 were to run concurrently; and the terms of Counts 1 and 5 were to run concurrently. However, the terms of Counts 2-4 were to run consecutively to the terms in Counts 1 and 5, for a total of seven years' imprisonment.

§ 4216. He was committed to the custody of the Attorney General for treatment and supervision under 18 U.S.C. § 5010(b) until discharged.

This appeal follows.

ISSUES

The appellants argue that the various counts were improperly joined. We agree that Count 1 should not have been joined with the others because it was not part of the same series of acts or transactions as Counts 2 through 6.

The appellants also argue that the evidence was insufficient to support the convictions for mail fraud, because the mailings did not further the fraudulent schemes. We reject this argument. The jury could find that the schemes were furthered by the mailings cited in the indictment, including those mailings which occurred after the defendants had received their insurance payments. Such subsequent mailings helped to lull the insurance companies into a sense of complacency.

Finally, Dennis Lane argues that the evidence of perjury before the Grand Jury was insufficient. He contends that the questions concerning Sidney Heard's involvement were too ambiguous and imprecise to form the basis for a conviction. Moreover, he argues that his answers were literally truthful or the result of an honest mistake. We reject all of those claims and hold that the evidence was sufficient to support a conviction.

DISCUSSION

I. Misjoinder

Federal Rule of Criminal Procedure 8 governs the initial joinder of counts in a criminal trial. Because this case involves multiple defendants as well as multiple counts, we look to Rule 8(b) for the relevant standards. *See United States* v. *Welch*, 656 F.2d 1039, 1049 (5th Cir. Unit A 1981); *United States* v. *Levine*, 546 F.2d 658, 661 (5th Cir. 1977). Rule 8(b) provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Improper joinder under Rule 8(b) is inherently prejudicial. *United States* v. *Dennis*, 645 F.2d 517, 521 (5th Cir. 1981); *United States* v. *Marionneaux*, 514 F.2d 1244, 1248 (5th Cir. 1975). The granting of a motion for severance, where there has been misjoinder, is mandatory and not discretionary with the district court. *Id.* Thus, misjoinder under Rule 8(b) is a matter of law and completely reviewable on appeal. *United States* v. *Welch*, *supra*, 656 F.2d at 1049; *United States* v. *Marionneaux*, *supra*, 514 F.2d at 1048.

The critical question in this case is whether all of the counts are part of the same series of acts or transactions. The answer to that depends

> "on the relatedness of the facts underlying each offense.... [W]hen the facts underlying each offense are so closely connected that proof of such facts is necessary to establish each offense, joinder of defendants and offenses is proper." *United States* v. *Gentile*, 495 F.2d 626, 630 (5th Cir. 1974). When there is no "substantial identity of facts or participants between the two offenses, thee is no 'series' of acts under Rule 8(b)." *Marionneaux*, 514 F.2d at 1249.

United States v. *Welch*, *supra*, 656 F.2d at 1049; *see United States* v. *Nettles*, 570 F.2d 547, 551 (5th Cir. 1978).

There is no substantial identity of facts between Count 1 and the other counts. The El Toro fire and the related fraud on the Transamerica Insurance Group involved events that were entirely separate from the

other crimes and that were completed before the other crimes began. There was no fact that could be proved to establish guilt under Count 1 which would also establish any of the other offenses. *See United States* v. *Welch*, *supra*, 656 F.2d at 1049; *United States* v. *Gentile*, *supra*, 495 F.2d at 630.

The government concedes this point, but argues that there is a substantial identity of participants between the El Toro fraud and the other crimes. Specifically, Sidney Heard and J.C. Lane participated in each of the three arson schemes. This does not, however, establish any identity of participants between Counts 1 and 6. Dennis Lane was the sole participant in Count 6, committing perjury before the Grand Jury. We have found no evidence in the record, and the government has not attempted to argue, that Dennis was a participant in Count 1, the El Toro fraud.

We also fail to find a sufficient identity of participants to justify the joinder of Count 1 with Counts 2 through 5. Heard and J.C. Lane were two out of the five participants in the duplex fraud[6] and two out of the four participants in the flower shop conspiracy.[7] This court has held that the mere identity of a small number of participants will not justify the joinder of multiple offenses involving several persons. The offenses must be shown to be part of a single plan or scheme. *See United States* v. *Welch*, *supra*, 656 F.2d at 1049; *United States* v. *Levine*, 546 F.2d 658, 662-63 (5th Cir. 1977); *United States* v. *Nettles*, *supra*, 570 F.2d at 551; *United States* v. *Marionneaux*, *supra*, 514 F.2d at 1248. Mere similarity of the offenses is not sufficient. *See United States* v. *Diaz-Munoz*, 632 F.2d 1330, 1336 (5th Cir. 1980);

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[6] The participants in that offense were J.C. Lane, Dennis Lane, Andrew Lawson, Sidney Heard, and Marvin McFarland (whom Heard instructed to burn the duplex).

[7] The participants in that conspiracy were J.C. Lane, Dennis Lane, Sidney Heard, and William Lankford.

United States v. *Marionneaux*, *supra*, 514 F.2d at 1248; *see also United States* v. *Welch*, *supra*; *United States* v. *Nettles*, *supra*. Otherwise the government could take any two counts, however disconnected, and join them in one trial so long as they involved the same type of crime and some of the same defendants. The requirement of a common scheme ensures that the offenses are actually part of a *series* of transactions.

Proof of a common scheme is typically supplied by an overarching conspiracy from which stems each of the substantive counts. *See, e.g. United States* v. *Nickerson*, 669 F.2d 1016, 1022 (5th Cir. Unit B 1982); *United States* v. *Phillips*, 664 F.2d 971, 1016 (5th Cir. Unit B 1981); *United States* v. *Leach*, 613 F.2d 1295, 1303 (5th Cir. 1980). The indictment in this case charges no such conspiracy, however. Count 5 alleges a conspiracy to commit mail fraud in the Lubbock flower shop scheme, but that conspiracy did not encompass the prior El Toro fraud. *See United States* v. *Gentile*, *supra*, 495 F.2d at 632.

Nor does the indictment allege, or the evidence show, a single scheme involving all three fires. The El Toro fraud was conceived more than a year before the other offenses. It involved a different victim than the other crimes. *Compare United States* v. *Dennis*, *supra*, 645 F.2d at 520-21. The government points us to no evidence at trial showing that there was a greater plan to commit a series of arsons for profit when the El Toro fire was planned and carried out. On the contrary, when J.C. Lane first approached Sidney Heard and proposed the El Toro fire, Lane stated that he was in a losing restaurant business and wanted to get out of his lease and his partnership with Jack Stotts. The other two fires, by contrast, did not involve legitimate ongoing businesses with innocent partners;[8] both the duplex

[8] The other partners in the El Toro restaurant (Jimmy Lane, Bill Dale, and Jack Stotts) have not been implicated in the arson plan.

and the flower shop were set up purely for an insurance scam.

There is other evidence of a single scheme involving Counts 2 through 6. J.C. Lane, Dennis Lane, and Sidney Heard discussed both the duplex fire and the flower shop plan at a meeting in J.C. Lane's office several weeks after the duplex burned. In addition, the Lanes invested insurance proceeds from the duplex fire into the Lubbock venture. Thus, Counts 2 through 5 may be joined together. Moreover, since Count 6 involves perjury about Heard's participation in part of the scheme, that count may also be joined.

There are no such links, however, to Count 1. We hold that it was improperly joined with Counts 2 through 6. Rule 8(b) misjoinder is prejudicial *per se* in this circuit. *See United States* v. *Levine*, *supra*, 546 F.2d at 661; *see also United States* v. *Dennis*, *supra*, 656 F.2d at 521. Therefore, we reverse and remand. If the government still wishes to try J.C. Lane and Dennis Lane together, Count 1 must be severed from the others.

II. Sufficiency of Evidence

A. Mail Fraud

The appellants also argue that the evidence was insufficient to support the convictions for mail fraud in Counts 1 through 4. The mail fraud statute, 18 U.S.C. § 1341, only reaches those instances in which the use of the mails is part of the execution of a fraud. *See Kann* v. *United States*, 323 U.S. 88, 93-95, 65 S.Ct. 148, 150-151, 89 L.Ed. 88 (1944). The appellants make two separate arguments that the mailings alleged in the indictment did not further the El Toro fraud or the duplex fraud.

First, with respect to the El Toro Restaurant fire, the indictment alleges that on June 1, 1979, J.C. Lane caused to be mailed an envelope containing two items. They were: (1) a memorandum by David Lard (Trans-

america's adjustor) requesting his company's advice on settling the "business earnings/loss of profits" portion of Lane's policy; and (2) a list of monthly income and expenses for the El Toro Restaurant submitted by J.C. Lane. The indictment alleges that the mailing was for the purpose of executing a scheme to defraud Transamerica.

Lane contends, however, that the mailing did not have a sufficiently close relationship to the alleged scheme. *See United States* v. *Maze*, 414 U.S. 395, 399, 94 S.Ct. 645, 647, 38 L.Ed.2d 603 (1974). He argues that the information mailed on that occasion concerned only his own business expenses and that the mailing could not have furthered the execution of the fraud because he did not receive payment until five months later.

We disagree and hold that a jury could find that the mailing was for the purpose of executing the fraud. The memorandum by Lard was an early step in processing the claim under the business earnings portion of Lane's policy. It requested the company to consider the claim and render advice on a proper settlement. A reasonable jury could find that the memo helped get the wheels rolling and ultimately led to a payment under the claims.[9]

Moreover, the list submitted by J.C. Lane contributed to the process. Contrary to appellant's assertion,

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[9] J.C. could have reasonably forseen [*sic*] that Lard would send such a memo to the company headquarters after a claim was made for business expenses; therefore, J.C. can be said to have "caused" the mailing of the memo. *See United States* v. *Shaid*, 730 F.2d 225, 229 (5th Cir.1984).

> We have held that when an individual does an act with the knowledge that the use of the mails will follow in the ordinary course of business, or when such use can reasonably be forseen, even though not actually intended, then he/she "causes" the mails to be used.

Id.

the list never purports to register only J.C.'s business expenses. Rather, it is styled "a breakdown of income and expenses for *El Toro Restaurant* taken from averaging September, October, November and December records." Government's Exhibit 13 (emphasis added). Lard's memo refers to the list in the context of the business expense claim and describes it simply as a "list of profits[,] expenses[,] etc." *Id.* Reasonable jurors could conclude that J.C. submitted the list in support of the claim. They could also conclude that the list purported to provide Transamerica with an estimate of the average net profits the restaurant would have earned had it not been damaged.

Thus, the list was closely related to the fraudulent scheme. Moreover, its mailing furthered the execution of the fraud even though the ultimate settlement of the claim was for a different amount and was paid five months later. By submitting the estimate of lost earnings, Lane implicitly reemphasized his belief that the restaurant had a legitimate claim under the policy. Furthermore, his submission was a first step in the negotiations leading up to a final settlement. In sum, there was sufficient evidence to support the verdict on Count 1.

The appellants' argument with respect to Counts 2 through 5 is a bit more subtle but equally unavailing. The mailing alleged in Count 2 included a report by William Liles (the adjustor for Trinity Universal) and a Proof of Loss submitted by Dennis Lane and Andrew Lawson. The mailing in Count 3 included a separate memo by Liles and two Proofs of Loss submitted by Lane. In each case, the Proof of Loss corresponded to a payment that the insured had already received from Trinity Universal.[10] Likewise, the final mailing (con-

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[10] The first Proof of Loss was dated May 9, 1980; it substantiated a loss of $7,000.00. L & L Properties (the company of Lane and Lawson) received a draft for $7,000.00 on that same date.

taining fraudulent invoices prepared by Heard and J.C.) came on September 18, 1980, *two days after* the final payment under the policy.

The Lanes argue that none of these mailings was "for the purpose of executing the fraudulent scheme" because each mailing came after payment had been received—i.e. after the scheme had reached its fruition. *See United States* v. *Ledesma*, 632 F.2d 670, 677-78 (7th Cir. 1980). In *Ledesmaa*, a defendant was charged with mail fraud in connection with a scheme to defraud an insurance company. He reported the theft of his mobile home, although it had not actually been stolen. Upon receiving a check from the insurance adjustor, he submited a false Proof of Loss. The Seventh Circuit held that the scheme had reached fruition with the delivery of the check. Therefore, the subsequent mailing of the Proof of Loss did not come within the Mail Fraud statute. *Id.*

The Seventh Circuit relied upon the Supreme Court's reasoning in *United States* v. *Maze*, *supra*. We hold, however, that *Maze* is distinguishable from the present case. In *Maze*, the respondent Thomas Maze had stolen Charles Meredith's Bank Americard in Louisville, Kentucky, and then travelled to Southern California.

The Proof of Loss and Liles' report were mailed on May 15.

The Proofs of Loss alleged in Count 3 were not dated, but they were mailed along with Liles' memo on August 6, 1980. One of them claimed a loss of $3,000.00 Both sides agree that this document corresponded to a payment made on May 30, 1980. The other Proof of Loss claimed $2,000.00. The appellants argue that it corresponded to a payment made on May 21. The Government replies that the May 21 payment was represented by an entirely separate $2,000.00 Proof of Loss mailed on May 25. The government, however, never explicitly denies that either of the Proofs of Loss mailed on August 6 reflected a prior payment. Therefore, we will assume *arguendo* that each of the Proofs of Loss corresponded to money already received from Trinity Universal.

Along the way, he had obtained food and lodging by presenting the card and fraudulently signing Meredith's name. Maze was indicted for mail fraud because the sales slips were returned by mail to the Louisville bank that had issued the card, and ultimately the bank mailed the slips to Meredith. The Supreme Court held that the scheme reached its fruition when Maze received his goods and services. *Id.* 414 U.S. at 400-402, 94 S.Ct. at 648-649.

Moreover, the Court held that the subsequent mailings were not in execution of the fraud because there was no evidence that they could enhance the success of Maze's scheme:

> [T]here is no indication that the success of his scheme depended in any way on which of his victims [the motels or the bank] ultimately bore the loss. Indeed, from his point of view, he probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all.

Id. at 402, 94 S.Ct. at 649. The Court distinguished *United States* v. *Sampson*, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962), in which subsequent mailings were held to be in execution of fraud because they were designed to lull the victims into a false sense of security and postpone investigation. Maze could not have intended the mailing of his sales slip to have such a lulling effect. "[T]he successful completion of the mailings from the motel owners . . . to the Louisville bank [and ultimately to Meredith] increased the probability that respondent would be detected and apprehended." 414 U.S. at 403.

In the present case, however, the jury could infer that the mailings were intended to and did have a lulling effect.[11] The Proofs of Loss and the false in-

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[11] The trial judge had instructed the jury that mailings "which facilitate concealment of the scheme are mailings in furtherance of the scheme." Record at 292.

voices submitted by Dennis Lane were "designed to . . . make the transaction less suspect," convincing Trinity Universal that the claims were legitimate. *United States* v. *Schaid*, *supra* note 9 at 230; *United States* v. *Toney*, 598 F.2d 1349, 1353 (5th Cir. 1979), *citing United States* v. *Sampson*, *supra*.

The Proofs of Loss declared that the "loss did not originate by any act, design or procurement on the part of [the] insured" and that no attempt had been made to decieve the insurance company. Trinity required the insured to submit the forms; any failure to comply might have alerted Trinity to the possibility of a fraud.

Similarly, the invoices gave the impression of a perfectly innocent claim. The building supplies and furniture that Lane claimed to have purchased for the duplex were set out in minute detail. The invoices were dated randomly and torn out of the invoice book at random points to indicate that L & L Properties was not the sole customer of the "supplier" Trim-Tex. A reasonable jury could find that all of these details were intended to lull Trinity into a false sense of security.

The three mailings were for the purpose of executing the fraudulent scheme. The evidence was sufficient to support the mail fraud convictions.

B. Perjury Before the Grand Jury

Dennis Lane also contests the sufficiency of evidence on the perjury count. The indictment alleges that he committed perjury by denying that Sidney Heard had anything to do with the flower shop or with Dennis's dealings with Lankford. Dennis argues that the evidence was insufficient for three interrelated reasons:

1. The questions propounded to Appellant before the Grand Jury were so ambiguous and imprecise that such questions cannot serve as a predicate for prosecution and conviction for making a false statement in response to such questions;

2. Appellant gave literally truthful answers to the ambiguous and imprecise questions propounded to him before the Grand Jury; and
3. Appellant's answers were the result of honest mistake and misunderstanding of ambiguous and imprecise questions.

Appellant's Brief at 24-25.

Dennis Lane claims that the questions were ambiguous, because they could be interpreted to ask whether Heard owned the flower shop. It is true that the

> essence of the crime of false swearing is the defendant's knowledge at the time of his testimony that it is untrue. . . . The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry.

United States v. *Crippen*, 570 F.2d 535, 537 (5th Cir. 1978); *see also Bronston* v. *United States*, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973). The questions put to Dennis Lane, however, were not ambiguous in the context of the case. *See United States* v. *Makris*, 483 F.2d 1082, 1087-88 (5th Cir. 1973). Sidney Heard had been intimaely involved with the flower shop and with the transactions between Dennis Lane and William Lankford. Heard proposed the flower shop scheme at the original meeting in J.C. Lane's office. Heard said that he knew a man who could supply the flowers; and after the meeting, he visited Lankford to solicit his participation in the fraud. Heard introduced Lankford to Dennis Lane in June, 1980, when Heard and Dennis came out to inspect Lankford's existing flower shop. Then, in July, Heard helped Dennis pick out the property in Lubbock for the new shop that was to be burned. Before parting that day, Dennis gave Heard a check made out to L & L Designs (Lankford's company) for the first shipment of flowers.[12]

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[12] During his testimony before the Grand Jury, Dennis stated that he had given Lankford $5,000.00 cash for the flowers. Later, on June 26, 1981, Dennis's attorney wrote a letter to

Heard and Lankford planned to split $20,000.00 of the insurance proceeds, as reflected by a $20,000.00 note payable to L & L Designs from Lane's Flower Deisngs. Lankford drew up the note, and Heard hand-delivered it to Dennis Lane to be signed. After it was signed, Heard kept the original. Heard also delivered fictitious invoices from Lankford to Lane.

Clearly, the question whether Heard had "*anything to do with* the flower shop" would cover his involvement in the scheme. The question does not mention ownership of the shop, but asks whether Heard had *any* involvement. The jury could properly find the question unambiguously covered his conduct. In the same way, the question whether Heard had "*anything to do with* [Dennis's] dealings with Mr. Lankford" clearly covered Heard's close involvement in recuriting Lankford, introducing him to Dennis, and delivering documents from one to the other. We cannot agree that the questions were so ambiguous and imprecise as to preclude a guilty verdict. A reasonable jury could find that Dennis understood the questions and knew that his answers were false.

CONCLUSION

In sum, we find that Count 1 was improperly joined with Count 2 through 6. We must reverse and remand. None of the counts is dismissed outright, however, because the evidence was sufficient to support the convictions for mail fraud and perjury.[13]

REVERSED and REMANDED.

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government counsel stating tht Dennis had found the check to L & L Designs. The check refreshed his memory, and he now recalled that he had delivered the check rather than cash to Lankford. At trial, however, Dennis conceded that he had given the check to Sidney Heard.

[13] The appellants have not challenged the sufficiency of evidence on the conspiracy count.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1742

D.C. Docket No. CR-2-83-012

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JAMES C. LANE AND DENNIS R. LANE,
DEFENDANTS-APPELLANTS.

[Filed June 18, 1984]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before GOLDBERG, RUBIN and REAVLEY, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court in accordance with the opinion of this Court.

ISSUED AS MANDATE:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1742

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JAMES C. LANE AND DENNIS R. LANE,
DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND SUGGESTION FOR FOR REHEARING EN BANC
(Opinion June 18, 5 Cir., 1984, ___ F.2d ___)
(August 22, 1984)

Before GOLDBERG, RUBIN and REAVLEY, *Circuit Judges.*

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Proce-

dure and Local Rule 35) the Suggestion for Rehearing En Banc in also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideraton of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc in DENIED.

ENTERED BY THE COURT:

/S/ _____
United States Circuit Judge